

Supreme Court, U.S.
FILED

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No. 89-1518

JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1989

KENNETH G.M. MATHER, AS TRUSTEE OF THE
ESTATE IN BANKRUPTCY OF M. FRANK WATSON
AND BETTY L. WATSON, AND
BRIAN HARJO WATSON,

Petitioners,

v.

BILL WEAVER, ET AL.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondents Bill Weaver, Tom Newton and the Board of Commissioners of Okmulgee County, Oklahomas' statement of the case accurately depicts the proceedings below. (Resp. 5-16). Accordingly, respondents Andrew S. Hartman; Andrew S. Hartman, P.C.; Barkley, Rodolph, White & Hartman ("law firm"); and S & T Gas Transmission Company, Inc. adopt their statement and supplement it with the following.

Petitioners appeal to the Tenth Circuit Court of Appeals challenged only the district court's application of

Parratt v. Taylor, 451 U.S. 527 (1981) to respondents' alleged Fourth Amendment violations. (App. *infra*, 1a-15a). The district court's decision concerning petitioners' due process claims was not questioned. *Id.*

On rehearing, petitioners sought from the court of appeals clarification on the issue of whether the district court's judgment as to respondents Hartman, Weaver and Newton was reversed as to these parties in their individual and official capacities or as to their individual capacities only. (App., *infra*, 16a-18a). Again, no reference was made to petitioners' due process claims. *Id.*

The Tenth Circuit thereafter issued an order denying petitioners' request for rehearing on the merits but clarifying its previous pronouncement by ruling petitioners' Fourth Amendment claims could not be pursued against Hartman's professional corporation or Hartman, Weaver and Newton except in their personal capacities. (Pet. 16a). No reference was made in the order to the respondent law firm, Barkley, Rodolph, White & Hartman, nor did petitioners seek further clarification of the Tenth Circuit's decision as it applied to the law firm. *Id.*

REASONS WHY THE PETITION SHOULD BE DENIED

The Tenth Circuit did not commit any error nor did it place itself in conflict with other courts of appeal or decisions of this Court, more particularly the recent pronouncement in *Zinermon v. Burch*, ____ U.S. ____ 110 S.Ct. 975 (1990). The due process issues petitioners seek for review are raised for the first time in this case. These issues have never been addressed by the lower courts

rendering them waived or premature at best. Further, these respondents are entitled to absolute immunity, the same immunity the district court recently afforded to respondents Newton and Weaver, (Resp. 4, 5), which abates the need for this Court to exercise jurisdiction.

I.

THE PETITION FOR CERTIORARI RAISES ISSUES NOT PRESENTED TO NOR CONSIDERED BY THE COURTS BELOW

Petitioners for the first time in this case call into question what they contend to be an "established state procedure" which allows for the "overbroad execution on a judgment . . . with the valid exemptions available only for later assertion." (Pet. 12). They assert the State's failure to establish procedures by which an owner of property [a judgment debtor who has chosen not to post a supersedeas bond] can assert entitlement in the property before it is seized destroys an owner's entitlement without due process. (Pet. 12). At no time in the lower proceedings did the petitioners attack Oklahoma's post judgment levy and execution process. (App. *infra*, 1a-18a).

As a general rule, new questions may not be raised for the first time on Supreme Court review. *DeShaney v. Winnebago County Dept. of Social Services*, ___ U.S. ___, 109 S.Ct. 998, 1003 n.2 (1989); *Rogers v. Lodge*, 458 U.S. 613, 628 n.10 (1982). An issue raised for the first time by petition for certiorari should not be considered, especially where the petitioner represents to the court of appeals that a different issue would be determinative of the case. *U.S. v.*

Ortiz, 422 U.S. 891, 898 (1975). Even where the issue may have been presented to the district court, this Court does not ordinarily consider issues neither raised before nor considered by the court of appeals. *Patrick v. Burget*, 486 U.S. 94, 100 (1988); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Petitioners appeal to the Tenth Circuit focused on one issue, the district court's application of *Parratt* to their Fourth Amendment search and seizure claims. (App., *infra*, 1a-15a). No challenge was ever made by petitioners to the district court's findings concerning their due process claims in their brief or request for rehearing filed with the court of appeals. (*Id. infra*, 16a-18a). Petitioners' criticism of the court of appeals' failure to perform a due process scrutiny of an "established state procedure" is therefore unfounded inasmuch as petitioners never raised the issue. (Pet. 11).

Petitioners' argument the lower court did not or could not have properly determined the deprivation of petitioners' property was "random and unauthorized," (Pet. *Id.*), also provides no basis for this Court to grant certiorari for the same reasons as well. The district court's conclusion the acts of Hartman were "random and unauthorized" was never questioned by petitioners in their appeal to the Tenth Circuit. (App. *infra*, 1a-15a). In the past, this Court has declined to review findings of fact upon which both the district court and the court of appeals have agreed. *Branti v. Finkel*, 445 U.S. 507, 512 n.6 (1980).

II.

THE TENTH CIRCUIT'S RULING
IS NOT CONTRARY TO LAW

The Tenth Circuit's decision is not in conflict with the teachings of *Logan v Zimmerman Brush Co.*, 455 U.S. 422 (1982). In *Logan* the complainant was challenging the state system which, by *operation of law*, destroyed his property interest in adjudicatory procedures whenever the Fair Employment Commission failed to convene a timely fact finding conference (emphasis added). There was no claim of a state official's error in implementing state law. *Id.* at 436. Thus, the court was not dealing with a "tortious loss of property as a result of a random and unauthorized act by a state employee . . . not the result of some established state procedure." *Id.* (quoting *Parratt*, 451 U.S. at 541).

Petitioners attempt to apply the *Logan* "established state procedure" analysis to this case by characterizing the due process violations as arising from an allowance at the state level of an overbroad execution of judgments to occur. (Pet. 12). This characterization is misplaced. The alleged due process violations, as documented by the underlying facts and the lower court's ruling, did not arise by operations of law or as a result of an "established state procedure" but from "random and unauthorized" conduct, i.e., the physical entry into a judgment debtor's home, an act not condoned or permitted under Oklahoma law. (Pet. 3a, 9a, 10a). This case thus falls under the parameters of *Parratt*, as opposed to *Logan*.

Further, the recent pronouncement in *Zinermon v. Burch*, ___ U.S. ___, 110 S.Ct. 975 (1990) does not provide a

basis to reconsider the Tenth Circuit's rulings. Certiorari was granted in *Zinermon* to resolve the conflict over the scope of *Parratt*. *Id.* at 978 n.2. The specific issue reviewed was whether *Parratt* applied in situations where state officials had the state-clothed authority to effect a deprivation as well as the power to prove a hearing before the deprivation process. *Id.* In *Zinermon*, a mental patient was committed into a state institution "without either valid consent or an involuntary placement hearing by the very state officials charged with the power to deprive mental patients of their liberty and the duty to implement procedural safeguards." *Id.* at 990. Under those circumstances this Court concluded such state officials could not escape liability by invoking *Parratt*, or *Hudson v. Palmer*, 488 U.S. 517 (1984). *Zinermon, supra.*

In so concluding, three reasons were distinguished as to why such a situation was not controlled by either *Parratt* or *Hudson*: (i) *the deprivation complained of was unpredictable* (it was not unforeseeable a person requesting treatment for mental illness might be incapable of formal consent; one could predict at a specific point in the admission process when such a deprivation might occur, the point in time the patient was given an admission form to sign); (ii) *establishment of a predeprivation process is not impossible or absurd* (it is not impossible to insure established involuntary placement procedure is afforded to all patients who are unwilling or unable to give consent; nor is it absurd to suggest had the state limited and guided the power of the state hospital and its staff to admit patients, the deprivation might have been averted); (iii) *conduct of officials not unauthorized in the sense of Parratt and Hudson* (employees not only delegated

with authority and power to effect deprivation but delegated with concomitant duty to initiate procedural safeguards set up by state law to guard against unlawful confinement). *Zinermon, supra* at 989, 990.

This case clearly does not fall under the criteria established in *Zinermon*. First, while the state may be able to predict its officials might negligently or even intentionally enter a judgment debtor's home and take personal property, there is no way for the state to know or predict when the deprivations may occur. Second, the nature of this deprivation makes it impossible for the state to provide a hearing to determine whether or not a state employee should engage in negligent or intentional conduct. This would be particularly absurd since such a taking would likely only occur after a judgment had been entered, the debtor had been given the opportunity to post a supersedeas bond to postpone any levy or execution, and a writ of execution had been issued. Third, respondent Hartman as well as Weaver and Newton were not delegated with the authority both to effect the deprivation and to initiate procedural safeguards to preclude it. Therefore, *Parratt* controls.

III.

A PRIVATE LAW FIRM SHOULD NOT BE HELD VICARIOUSLY LIABLE IN 42 U.S.C. § 1983 ACTIONS

The Tenth Circuit, pursuant to petitioners' request for certification of its ruling, ruled the petitioners could not proceed against Hartman's professional corporation. (Pet. 16a). No indication was made as to whether this ruling

applied solely to Andrew S. Hartman, P.C. or the respondent's law firm, Barkley, Rodolph, White & Hartman, an Oklahoma corporation. Although petitioners sought no further clarification of this issue, respondents, for argument sake, assume the Tenth Circuit's reversal of the district court's ruling did not apply to the law firm as well.

The Tenth Circuit's ruling is consistent with its previous ruling in *DeVargas v. Mason & Hanger-Silas Mason Co., Inc.*, 844 F.2d 714 (10th Cir. 1988), the language of 42 U.S.C. § 1983 and this Court's interpretation of the Congressional intent behind § 1983. *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978). A municipal corporation is not subject to § 1983 liability via *respondeat superior* alone. *Id.* This holding should equally apply to private entities which are only saddled with § 1983 liability when they conspire with or act in concert with state officials. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

The specific language of § 1983 and the conclusions drawn by this Court interpreting the Congressional intent exact this conclusion. Section 1983 liability is focused on those persons who "subject, or cause to be subjected," another person to a constitutional deprivation. This Court found this language evincing a Congressional intention to exclude the imposition of vicarious answerability. *Monell*, *supra* at 691-92. Moreover, this Court observed that the policy considerations underpinning the doctrine of *respondeat superior* insufficient to warrant its integration into the statute. *Id.* at 694. There is nothing in the language of the statute itself or in this Court's reasoning in *Monell* which lends support for distinguishing the case of

a private corporation and incorporating state vicarious liability law into § 1983. Several lower courts have, in fact, chosen not to do so. *Powell v. Shopco Laurel Co.*, 678 F.2d 504 (4th Cir. 1982); *Iskander v. Village of Forest Park*, 690 F.2d 126 (7th Cir. 1982); *Iodice's Estate v. Gimbel's, Inc.*, 416 F.Supp. 1054 (E.D. N.Y. 1976); *Weiss v. J.C. Penney Co., Inc.*, 414 F.Supp. 52 (N.D. Ill. 1976).

Moreover, resort to a state statute for purposes of establishing a basis for vicarious liability against an entity which did not participate in a civil rights violation where no such basis has been established by Congress is not authorized under the provisions of § 1988. *Moor v. Alameda County*, 411 U.S. 693 (1973). Section 1988 was intended to do nothing more than to explain the source of the law to be applied in actions brought to enforce the substantive provisions of the [Civil Rights] Act not to "authorize the wholesale importation into federal law of state causes of action - not even one purportedly designed for the protection of federal civil rights." *Id.* at 703-04. Accordingly, this Court held in *Moor* that Congress did not intend, as a matter of federal law, to create a substantive right within § 1983 to sue a public entity on the theory of its vicarious liability. *Id.* To impose vicarious liability either through common or statutory law against Hartman's professional corporation or the law firm on the theory of *respondeat superior* would be inconsistent with Congressional intent as well.

IV.

**RESPONDENTS ARE ENTITLED
TO ABSOLUTE IMMUNITY**

On March 15, 1990, the district court granted summary judgment for respondents Weaver and Newton based on the theory of judicial immunity. (Res. 3, 4, 1a-5a). Respondents Hartman, individually; Hartman in his professional capacity; as well as the law firm, have asserted this defense from the outset and in their original motion for summary judgment to the district court. (Pet. 9a). In light of the district court's recent ruling these respondents also intend to immediately reassert the immunity defense in the district court which based its decision on the Tenth Circuit's ruling in *Valdez v. City and County of Denver*, 878 F.2d 1285, 1290 (10th Cir. 1989) (absolute immunity afforded to officials carrying out judicial orders). Respondents maintain this decision is applicable to them as well. Indeed, this Court has suggested as much. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982).

In *Lugar* the majority opinion noted the problem of holding private individuals liable for invoking seemingly valid state laws subsequently found to be unconstitutional "should be dealt with . . . by establishing an affirmative defense." *Id.* at 942 n.23. The Court then suggested as a defense the qualified immunity defense available to state officials. *Id.* The dissenting opinion expressly provided that a private creditor who invoked a presumptively valid state prejudgment attachment law and the aid of state officials was entitled to assert a good faith defense. *Id.* at 956 n.14.

Several circuits in addition to the Tenth, have extended the immunity defense to private party defendants who received the aid of public officials to attach or garnish a plaintiff's property, the courts concluding private party state actor defendants should not be deprived of the qualified immunity defense. See, e.g., *Jones v. Preuit & Mauldin*, 808 F.2d 1435, 1440-42 (11th Cir. 1987), vacated in part on other grounds, 822 F.2d 998 (11th Cir. 1982), opinion vacated and reh'g granted en banc, 833 F.2d 1436 (11th Cir. 1982); *Watertown Equip. Co. v. Northwest Bank Watertown, N.A.*, 830 F.2d 1487 (8th Cir. 1987); *Folsom Inv. Co. v. Moore*, 681 F.2d 1032 (5th Cir. La 1982). See also, *Shipley v. First Federal Sav. & Loan Ass'n of Delaware*, 703 F.Supp. 1122 (D. Del. 1988).

Immunity is applicable to Hartman's professional corporation and the law firm as well. The critical factor in the area of § 1983 immunity is not between an employer and individual defendant, but between defendants that are governmental bodies and individuals and other defendants. "Different considerations come into play when governmental rather than personal liability is threatened." *Owen v. City of Independence, Mo.*, 445 U.S. 622, 653 n.37 (1980) as cited in *DeVargas, supra* at 723. Thus, the fact a private party defendant is a corporation should not affect the application of immunity.

As the other respondents have argued, events subsequent to the ruling of the court of appeals may deprive this Court of the need to exercise jurisdiction. *Maher v. Doe*, 432 U.S. 526 (1977). (Res. 5). The district court's conclusion that absolute immunity is applicable to this case in essence renders the due process and *respondeat*

superior issues moot, thus diminishing this Court's need to exercise jurisdiction.

CONCLUSION

Pursuant to the foregoing argument and authorities the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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May 1990

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RICHARD LERBLANCE,)
BANKRUPTCY TRUSTEE and)
BRIAN HARJO WATSON,)
Appellants,)
vs.)
BILL WEAVER; TOM NEWTON;)
ANDREW S. HARTMAN;)
ANDREW S. HARTMAN, P.C., an)
Oklahoma corporation;)
BARKLEY, RODOLPH, WHITE, &)
HARTMAN, a law firm)
composed of Michael Barkley,)
Charles Michael Barkley, P.C.,)
an Oklahoma corporation,)
Stephen J. Rodolph, Jay B.)
White, Andrew S. Hartman,)
Andrew S. Hartman, P.C., an)
Oklahoma corporation, Sandra)
Rodolph and Denise G. Hartman;)
S & T GAS TRANSMISSION)
COMPANY, INC., an Oklahoma)
corporation; JOHN DOE;)
JANE DOE; and BOARD OF)
COMMISSIONERS OF)
OKMULGEE COUNTY,)
OKLAHOMA,)
Appellees.

No. 88-2796

BRIEF OF APPELLANTS

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UNITED STATES COURT OF APPEALS
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RICHARD LERBLANCE,)
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Rodolph and Denise G. Hartman;)
S & T GAS TRANSMISSION)
COMPANY, INC., an Oklahoma)
corporation; JOHN DOE;)
JANE DOE; and BOARD OF)
COMMISSIONERS OF)
OKMULGEE COUNTY,)
OKLAHOMA,)

No. 88-2796

Appellees.

CERTIFICATION REQUIRED BY 10TH CIR.R 28.2(a)

The undersigned certifies that the following parties and attorneys are now or have been interested in this litigation or any related proceedings. These representations are made to enable judges of the court to evaluate the possible need for disqualification or recusal.

1. There are parties to this appeal whose names are not revealed in the caption of this appeal. Richard Lerblance, the bankruptcy trustee, is trustee for Milburn Frank Watson and Betty L. Watson who have a Chapter 11 bankruptcy proceeding pending in the United States Bankruptcy Court for the Eastern District of Oklahoma. The trustee, Richard Lerblance, is an attorney at Hartshorne, Oklahoma.
2. Since this appeal arose, Richard Lerblance has resigned as trustee of the bankrupt estates and has been replaced by Kenneth G. M. Mather, an attorney having offices in Tulsa, Oklahoma.
3. The appellants are represented by Allen Mitchell, Sapulpa, Oklahoma, and by Ron Wright, Muskogee, Oklahoma.
4. Appellee S & T Gas Transmission Company, Inc. is an Oklahoma corporation which has no parent corporation nor any subsidiary corporations to the knowledge of appellants.
5. Appellees Bill Weaver and Tom Newton are represented by John Butler, attorney in Okmulgee, Oklahoma, and by Gregory D. Nellis, Patricia A. Lamb, and Kevin L. Ward of the law firm of Thomas, Glass, Atkinson, Haskins, Nellis & Boudreaux of Tulsa, Oklahoma.

6. Appellee Board of Commissioners of Okmulgee County, Oklahoma, is represented by Gregory D. Nellis, Patricia A. Lamb, and Kevin L. Ward of the law firm of Thomas, Glass, Atkinson, Haskins, Nellis & Bouldreaux [sic] of Tulsa, Oklahoma.

7. Appellees Andrew S. Hartman, Andrew S. Hartman, P.C., an Oklahoma corporation, Barkley, Rodolph, White & Hartman, a law firm composed of Michael Barkley, Charles Michael Barkley, P.C., an Oklahoma corporation, Stephen J. Rodolf, Jay B. White, Andrew S. Hartman, Andrew S. Hartman, P.C., an Oklahoma corporation, Sandra Rodolf, and Denise G. Hartman, and S & T Gas Transmission Company, Inc. are represented by Murray E. Abowitz of the law firm Abowitz & Welch of Oklahoma City, Oklahoma.

8. The appellees designated as John Doe and Jane Doe were never served with summons.

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BRIEF OF APPELLANTS

PRELIMINARY STATEMENT OF JURISDICTION

The trial court jurisdiction was invoked under 28 U.S.C. Sections 1331 and 1343 in that this action arose under Title 42 U.S.C. Section 1983 as a claim that appellees and each of them, under color of law, violated the rights of appellants as guaranteed by the laws and Constitutions of the United States and of Oklahoma. Appellants sued under 42 U.S.C. Section 1983 to recover damages arising from violation of appellants' Fourth Amendment rights and to recover damages for trespass and conversion arising under state law.

This Court of Appeals has jurisdiction of this appeal from the final decision of a United States District Court under 28 U.S.C. Section 1291. Final judgment was entered on the District Court docket sheet on September 27, 1988. The notice of appeal was timely filed on October 27, 1988, within 30 days after entry of judgment by the District Court and within the time limit set by Rule 4(a)(1) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW Standard for Review

On appeal, the appeal considers the grant of a summary judgment under the same standard employed by the district court. The review by this court is de novo because the ruling granting summary judgment involves purely legal determinations. A summary judgment should be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." F.R.C.P. 56(c). The evidence must be viewed in the light most favorable to appellants, against whom summary judgment was entered. (Adapted from *Missouri Pacific Railroad Co. v. Kansas and Electric*, case 87-1103, 10th Cir., December 1, 1988).

Issue for Review

Genuine issues of fact remain to be decided by a jury concerning appellants' claims that they were denied substantive due process and equal protection of the laws

when appellees broke into their dwelling house and removed property, in violation of the Fourth Amendment to the United States Constitution and Title 42 U.S.C. Section 1983.

STATEMENT OF THE CASE

This action arose on December 12, 1986, when Andrew S. Hartman, attorney for the judgment debtor S & T Gas Transmission Company, Inc., obtained a writ and caused the sheriff of Okmulgee County to break into the dwelling house of Milburn Frank Watson and Betty L. Watson and carry away property owned by Mr. and Mrs. Watson and their minor son, Brian Harjo Watson. During the pendency of this case Brian Harjo Watson became 18 years old, his age of majority under Oklahoma law.

S & T Gas had received a \$1.00 jury verdict in a Creek County trial. On hearing post trial motions the judgment was increased by Judge John Maley to \$85,244.11 plus interest of \$16,478.97 plus attorney fee judgment in favor of Barkley, Rodolph, White & Hartman for \$40,064.13. Entry of this judgment was appealed to the Oklahoma Supreme Court. While the case was on appeal, Barkley, Rodolph, White & Hartman started judicial collection activities, issuing garnishments and executions. Andrew Hartman was a partner in the law firm Barkley, Rodolph, White & Hartman.

The only evidence before the district court was portions of the deposition of Andrew Hartman. Depositions of other witnesses, including Sheriff Weaver, Deputy Sheriff Newton, Judge Maley and the Okmulgee County District Attorney were taken but were not transcribed nor

available before the district court entered summary judgment.

Hartman obtained an ex parte writ from Judge Maley which said in part:

*** Now, therefore, you are hereby commended (sic) to forcibly go upon the premises of said individuals, to enter the premises of said individuals and execute upon the personal property enumerated as Exhibit "A" to this Writ. (Hartman, et al., motion for summary judgment, filed August 26, 1988, attached as Exhibit A).

The writ was delivered to the Okmulgee County Sheriff for service on the Watsons. Hartman accompanied a Deputy Sheriff Newton to the Watson home to serve the writ. The Watsons were not home and their home was locked. Deputy Newton acted on instructions from Judge Maley and the Okmulgee County Assistant District Attorney that minimal force could be used to break into the Watson's home. (Plaintiffs' brief in opposition to defendants' motions for summary judgment filed September 14, 1988, attached deposition pages 71-73).

Deputy Newton broke into the Watson's home. He was accompanied by Hartman who went throughout the home and helped remove property from the home. An inventory of goods removed from the home was prepared. (Hartman, et al., motion for summary judgment, filed August 26, 1988, attached deposition pages 77-83 and 95).

Immediately after this, the Watsons filed a Chapter 11 Bankruptcy action. The goods taken from their home were later returned. The appeal from the entry of judgment notwithstanding the jury verdict was successful.

The judgments entered by Judge Maley were vacated and the original jury verdict of \$1.00 was reinstated.

Appellees Andrew Hartman, the law firm Barkley, Rodolph, White & Hartman, Sandra Hartman, Denise G. Hartman and S & T Gas filed a motion for summary judgment. The district court sustained their motion for summary judgment and also *sua sponte* entered judgment for Sheriff Weaver and Deputy Sheriff Newton. Appellants did not contest entry of summary judgment as to Sandra Rodolf and Denise G. Hartman who were not partners in the law firm.

Appellee Board of Commissioners of Okmulgee County, Oklahoma filed a separate motion for summary judgment which was sustained by the district court. This appeal is taken from the judgments of the district court entering summary judgment in favor of appellees and against appellants.

ARGUMENT AND AUTHORITIES

The district court applied to all appellees except the Board of Commissioners of Okmulgee County, the rationale of *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). The district court held that since entry into a dwelling house was not permitted under Oklahoma law that the action of entry was random and unauthorized, though authorized by Judge Maley and the Okmulgee County Assistant District Attorney. The district court further ruled that Oklahoma courts provide an adequate post-deprivation remedy for trespass and wrongful levy.

The Fourth Amendment to the United States Constitution provides substantive rights and prohibits warrantless entry into a home.

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The substantive right to be free from unlawful entry into one's home has been long recognized in English and American law. *Semayne's Case*, (1604) 5 Coke, 91a; Blackstone, "Commentaries on the Laws of England", Vol. 3, pages 414-417; 33 C.J.S., Executions, Section 96, page 242; 30 Am.Jur.2d, Executions, Section 261, page 598; 57 A.L.R., pages 210-211; Okla.Const., Art. II, Sec. 30. There is no authority to break into a dwelling house to seize property under a civil execution. Restatement of Torts, Second, Section 208, page 390; Restatement of Torts, Second, Comment on Section 208(2), pages 392-393. The district court agreed that Oklahoma law does not allow forcible entry into a dwelling to carry out a civil writ of execution.

Parratt involved only a claimed violation of a prisoner's right to procedural due process under the Fourteenth Amendment. *Parratt* involved a suit filed by a state prison inmate who did not receive his hobby kit. The prison officials had signed for the hobby kit, but it was lost and never delivered to the prisoner-plaintiff. The primary issue in *Parratt* was whether the prisoner-plaintiff had suffered a Fourteenth Amendment violation. There was no claim that the prisoner-plaintiff had suffered a Fourth

Amendment violation. The Supreme Court said at 451 U.S., pages 536-537:

Unquestionably, respondent's claim satisfies three prerequisites of a valid due process claim: the petitioners acted under color of sate [sic] law; the hobby kit falls within the definition of property; and the alleged loss, even though negligently caused, amounted to a deprivation. Standing alone, however, these three elements do not establish a violation of the Fourteenth Amendment. Nothing in that Amendment protects against all deprivations of life, liberty, or property by the State. The Fourteenth Amendment protects only against deprivations "without due process of law."

The court in *Parratt* concluded that the proper redress for loss of the hobby kit was through the state courts. The Supreme Court established a boundary in Fourteenth Amendment cases stating at 451 U.S., page 544:

Our decision today is fully consistent with our prior cases. To accept respondent's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official into a violation of the Fourteenth Amendment cognizable under Section 1983. It is hard to perceive any logical stopping place to such a line of reasoning. ***

In this case, appellants suffered a Fourth Amendment violation. The appellees did not dispute that Hartman obtained the writ, that Hartman delivered the writ to the Okmulgee County Sheriff, that the sheriff's office was advised by a member of the Okmulgee County District

Attorney's office to break into appellants' dwelling house and remove property listed in the writ (Okmulgee County summary judgment brief, filed August 22, 1988, page 3, paragraph 7; Hartman, et al., summary judgment brief, filed August 26, 1988, page 4, paragraphs 17 and 18).

The court of appeal which have applied *Parratt* to a Fourth Amendment violation have concluded that a Fourth Amendment violation is a substantive constitutional violation which is actionable under Title 42 U.S.C. Section 1983. *Augustine v. Doe*, 740 F.2d 322, 325-326 (5th Cir., 1984); *King v. Massarweh*, 782 F.2d 825, 827-828 (9th Cir., 1986); *Smith v. City of Fontana*, 818 F.2d 1411, 1414-1417 (9th Cir., 1987). The district court noted this principle but declined to apply the principle because this Court of Appeals has not adopted a Fourth Amendment exception to *Parratt*.

The district court entered summary judgment in favor of the Board of Commissioners of Okmulgee County under its analysis of *Meade v. Grubbs*, 841 F.2d 1512 (10th Cir., 1988). The district court found that the Board of Commissioners had no supervisory liability for the actions of Deputy Newton. Liability of Okmulgee County is not predicated on supervisory liability in this case. Appellants claim that the authorizations from Judge Maley, the Okmulgee county District Attorney's office, and Sheriff Weaver instructing Deputy Newton to forcibly enter the Watsons' dwelling house were establishment of policy in this case. Appellants believe that the facts in this case mirror the facts in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292 (1986). *Pembaur* is a Fourth Amendment violation case, arising after deputy sheriffs and city

police officers chopped open *Pembaur*'s door at his medical clinic to serve grand jury subpoenae. On the issue of whether the County Prosecutor's statements were "establishment of Policy," the *Pembaur* court said at 106 S. Ct., page 1301:

We might be inclined to agree with respondent if we thought that the Prosecutor had only rendered "legal advice." However, the Court of Appeals concluded, based upon its examination of Ohio law, that both the County Sheriff and the County Prosecutor could establish county policy under appropriate circumstances, a conclusion that we do not question here. Ohio Rev. Code Ann. Section 309.09 (1979) provides that county officers may "require instruction from (the County Prosecutor) in matters connected with their official duties." Pursuant to standard office procedure, the Sheriff's office referred this matter to the Prosecutor and then followed his instructions. The Sheriff testified that his Department followed this practice under appropriate circumstances and that it was "the proper thing to do" in this case. We decline to accept respondent's invitation to overlook this delegation of authroity [sic] by disingenuously labeling the Prosecutor's clear command mere "legal advice." In ordering the Deputy Sheriffs to enter petitioner's clinic the County Prosecutor was acting as the final decision maker for the county, any theref [sic] Section 1983.

The facts in this appeal are close, if not identical, to those in *Pembaur* for the purpose of asserting claims for a Fourth Amendment violation under Section 1983. Deputy Newton got advice from the District Attorney's office and was told to forcibly enter plaintiff's dwelling house. In *Pembaur* the Supreme Court decided that the County Prosecutor set county policy under the facts in that case.

CONCLUSION

The district court erroneously determined that as a matter of law the appellants had no cause of action against apperlees [sic]. The forcible entry into the Watsons' dwelling house was a substantive violation of appellants' Fourth Amendment rights. Appellees Hartman, the law firm of Barkely, Rodolf, White & Hartman, and Sheriff Weaver and Deputy Newton have liability under Section 1983. When the District Judge and the assistant district attorney instructed Deputy Newton to break into the Watson's dwelling house, they set county policy in this case and Okmulgee County, through the Board of Commissioners, has liability under Section 1983.

The district court decision must be vacated and reversed as to all appellees except Sandra Rodolf and Denise G. Hartman and remanded with instructions to allow this case to proceed to jury trial.

STATEMENT CONCERNING ORAL ARGUMENT

Appellants believe that oral argument would be appropriate and helpful to this Court since the issue of a Fourth Amendment exception to the *Parrati* decision has not been decided in this circuit.

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By /s/ Allen Mitchell

CERTIFICATE

I certify that on December 27, 1988, copies of the above instrument were mailed to the following:

Murray E. Abowitz, P. O. Box 1937, Oklahoma City, OK 73101;

Thomas, Glass, Atkinson, Haskins, Nellis & Boudreaux, Suite 1500 ParkCentre, 525 South Main, Tulsa, OK 74103; and

Kenneth G. M. Mather, 700 Sinclair Building, 6 East 5th Street, Tulsa, OK 74103.

/s/ Allen Mitchell

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

M. FRANK WATSON; BETTY L.)	
WATSON; BRIAN HARJO)	
WATSON, a minor, by)	
and through his mother and next)	
friend, Betty L. Watson,)	
Plaintiff-Appellants,)	
v.)	No. 88-2796
BILL WEAVER; TOM NEWTON;)	(D.C. No.
ANDREW S. HARTMAN;)	87-412-C)
ANDREW S. HARTMAN P.C.,)	(E.D. Okla.)
an Oklahoma corporation;)	
BARKLEY, RODOLF WHITE &)	
HARTMAN, a law firm composed)	
of Michael Barkley, Charles)	
Michael Barkley, P.C., an Oklahoma)	
corporation, Stephen J. Rodolf,)	
Jay B. White, Andrew S. Hartman,)	
Andrew S. Hartman, P.C.,)	
an Oklahoma corporation,)	
Sandra Rodolf and Denise G.)	
Hartman; S & T GAS)	
TRANSMISSION COMPANY,)	
INC., an Oklahoma corporation;)	
JOHN DOE; JANE DOE;)	
BOARD OF COMMISSIONERS)	
OF OKMULGEE COUNTY,)	
OKLAHOMA,)	
Defendants-Appellees.)	

PETITION FOR REHEARING
SUGGESTION FOR REHEARING IN BANC

Kenneth G. M. Mather, as Trustee of the Estate in
Bankruptcy of M. Frank Watson and Betty L. Watson, and

Brian Harjo Watson, as plaintiff/appellants, pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, hereby petition this Court for rehearing *in banc* and show the Court that:

1. The Order and Judgment of this Court dated August 8, 1989, affirmed the judgment of the trial court as to all defendants other than Andrew Hartman, Bill Weaver, and Tom Newton and did not specify whether the trial court's judgment as to defendants Weaver and Newton is reversed as to said defendants in their individual and official capacities, or whether the judgment is reversed as to Weaver and Newton in their individual capacities, only.
2. Rehearing is therefore necessary in order to clarify whether defendants Weaver and Newton remain defendants in the case at bar in their official capacities as well as in their individual capacities.
3. The Order and Judgment of this Court also did not specify whether the judgment of the trial court in favor of defendant Hartman was reversed as to defendant Hartman in his individual capacity only, or whether the judgment was reversed as to his corporate capacity as well, to wit, Andrew S. Hartman, P.C.
4. Rehearing is therefore necessary in order to clarify whether defendant Hartman remains defendant in the case at bar in his corporate capacity, as well as his individual capacity.
5. This Court, in reviewing the judgment of the trial court, properly reviewed the trial court's grant of

summary judgment *de novo*, but misapplied the standard of review.

6. Rehearing is therefore necessary to determine whether the standard of review used by this Court was proper.
7. In ruling that under no theory should plaintiffs' claims proceed against defendant Barkley, Rodolf, White & Hartman, this Court and the trial court apparently misconstrued the applicability of the the [sic] acts of defendant Hartman as a partner of the firm under 42 U.S.C. Sec. 1983.
8. In ruling that under no theory should plaintiffs' claims proceed against defendant Board of Commissioners of Creek County, this Court and the trial court failed to recognize that the Sheriff and deputy Sheriff of Okmulgee County are official county policy makers under the statutes of the State of Oklahoma and the facts of this case, and that the Board of County Commissioners can be held liable for his acts.

STATEMENT IN SUPPORT OF SUGGESTION FOR REHEARING IN BANC

I express a belief based on a reasoned and studied professional judgment that the panel decision is contrary to the following decisions of the United States Supreme Court or of the United States Court of Appeals for the Tenth Circuit, and consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court:

Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

Pembauer [sic] v. City of Cincinnati, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986).

I further express a belief based on a reasoned and studied professional judgment that this appeal involves one or more questions of exceptional importance:

1. Whether the grant of authority over the subject of service of civil process under the Oklahoma Statutes to the Sheriff and his deputies of Okmulgee County, together with his statutory responsibility under Oklahoma law for all acts of his duly appointed deputies, create a sufficient causal nexus between the illegal break in under color of State law by an Okmulgee County deputy Sheriff of the dwelling house of plaintiffs and Okmulgee County, through its official policy makers, the Sheriff, his deputies, and therefore render the county liable under the holding of *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).
2. Whether under the circumstances of this case, a deputy Sheriff can be construed as a *de facto* policy maker and therefor [sic] render the county liable under the holding of *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) and *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 454 (1986).

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